

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 8:03-CR-77-T-30TBM

GHASSAN ZAYED BALLUT

**DEFENDANT GHASSAN BALLUT'S MOTION FOR ORDER TO REMOVE
DEFENDANT'S NAME FROM NO-FLY LIST AND MEMORANDUM OF LAW**

The Defendant, GHASSAN ZAYED BALLUT, by and through his undersigned counsel, hereby requests this Honorable Court to issue its order to the Transportation Security Administration of the United States Department of Homeland Security to remove the Defendant's name from the list of individuals prevented from boarding commercial aircraft pursuant to the authority granted by Title 49 of the United States Code, Section 114(h)(3), for the purpose of permitting the Defendant to fly between the Northern District of Illinois and the Middle District of Florida during the course of the jury trial in this cause, and as grounds therefor states:

1. Under the terms of the orders setting the conditions for the Defendant's release (Docs. 74 and 107), the Defendant is permitted to travel between the Northern District of Illinois, where he resides and operates his business, and the Middle District of Florida.

2. The jury trial in this cause is now set to commence on April 4, 2005, will convene from Monday through Thursday of each week, and is anticipated to last several months.

3. The Defendant is not only required to appear for jury trial but also as a matter of right intends to be present at all proceedings in connection with the jury trial and to consult with counsel.

4. Because the Defendant's wife and children will continue to reside at the Defendant's home in the Northern District of Illinois, because the Defendant owns and operates a business, Tailor's Final Touch and Dry Cleaners, in the Northern District of Illinois, and because several documents, items of evidence, and witnesses in support of the Defendant's defense are located in the Northern District of Illinois, the Defendant wishes to return to the Northern District of Illinois from time to time during the prolonged course of the jury trial to attend to legal matters in connection with this case as well as personal and business matters.

5. On December 3, 2003, the Defendant's undersigned counsel took the precaution of writing to the Office of Security of the Transportation Security Administration to inquire whether the Defendant had been placed on the "no-fly" list, enclosing a copy of the Court's order permitting the Defendant to travel between the Northern District of Illinois and the Middle District of Florida (Doc. 107), but the Defendant's undersigned counsel received no direct response to this inquiry. See Exhibit A, attached hereto.

6. Seven weeks later, on January 21, 2004, the Defendant attempted to fly by commercial airline from Midway Airport at Chicago to the Tampa International Airport to meet with his undersigned counsel and to review evidence in Tampa in connection with this case, and at that time the Defendant was positively informed for the first time that his name appeared on the Transportation Security Administration's "no-fly" list and that he would be prevented from boarding an aircraft until his name was removed from the "no-fly" list.

7. After the Defendant's release from custody in April 2003 and before the incident on January 21, 2004, the Defendant had flown between Chicago and Tampa three times without incident to attend to matters in connection with this case.

8. Since January 21, 2004, the Defendant has been obligated to take surface transportation to travel between the Northern District of Illinois and the Middle District of Florida, a distance of approximately 1,200 miles, requiring between two and three days for travel each way.

9. Because the Defendant is restricted to surface travel, and because he will have not more than three days between each weekly session of the jury trial, any return to the Northern District of Illinois during the several months of trial will be a practical impossibility, effectively confining the Defendant to the Middle District of Florida for the duration of the trial without direct access to his residence, his business, his records, and his witnesses, notwithstanding the letter and purpose of the Court's release orders (Docs. 74 and 107).

10 If the Defendant were permitted to travel by air, the Defendant would be able to return to his residence and his business on weekends between weekly trial sessions from time to time.

11. The Defendant's undersigned counsel has communicated with the Transportation Security Administration to obtain permission for the Defendant to travel by commercial airline during the trial, but the Transportation Security Administration has not responded to counsel's communications. See Exhibit B attached hereto.

12 The Defendant is willing to accept such conditions and restrictions as necessary from the Court and the Transportation Security Administration in order to obtain a waiver or permit to travel by commercial airline during the jury trial.

13. Considering of the timing and circumstances under which the Defendant was placed on the Transportation Security Administration's "no-fly" list, and considering the ability of the

Defendant to fly commercially prior to the Defendant's counsel informing the Transportation Security Administration in December 2003 of the Defendant's connection to this case, it is clear that the Defendant was placed on the "no-fly" list solely or primarily because of his status as a defendant in this case. See Exhibit A, attached hereto.

14. As a result, the Transportation Security Administration's administrative decision to place the Defendant on the "no-fly" list was done with full knowledge and understanding that such a restriction would impair the Defendant's ability to travel between his home and business in the Northern District of Illinois and his counsel's office and the place of trial in the Middle District of Florida, in deliberate indifference to the Defendant's due process rights, right to counsel, and right to the possession and enjoyment of his property, including his residence and his business, under the Fifth and Sixth Amendments of the United States Constitution.

15. Further, the Transportation Security Administration's administrative decision to place the Defendant on the "no-fly" list was in knowing contravention of the purpose and intent of the Court's orders (Docs. 74 and 107) which permitted the Defendant to be released and to travel between the Northern District of Illinois and the Middle District of Florida so that the Defendant could reside at home, attend to his business, meet with his counsel, and appear at trial.

16. As such, the Court has jurisdiction to consider and determine the effect of the Transportation Security Administration's deliberate contravention upon the order of this Court and to provide the Defendant with a remedy that comports with the Defendant's right to due process.

17. The Transportation Security Administration's decision to place the Defendant on the "no-fly" list was made without any pretense of due process, including notice, hearing, and

appeal, and given the purported purpose of the “no-fly” list compared to the nature of the offenses charged against the Defendant, there appears to be no rational basis between the governmental interest and the means used to achieve that interest.

18. To fulfill its security concerns, the Transportation Security Administration has the option of placing the Defendant on the “selectee” list containing the names of persons subject to enhanced screening who are permitted to board and fly commercial aircraft.

19. Under the facts and circumstances of this case and because of the constitutional issues raised, the authority of the Court to determine the conditions of release and the Defendant’s rights to trial, to counsel, and to the possession and use of his property outweigh the interest of the Transportation Security Administration in placing the Defendant on the “no-fly” list because of the Defendant’s connection to this case.

WHEREFORE, the Defendant requests this Honorable Court to order the Transportation Security Administration of the United States Department of Homeland Security to remove the Defendant’s name from the list of individuals prevented from boarding commercial aircraft for the purpose of permitting the Defendant to fly between the Northern District of Illinois and the Middle District of Florida during the course of the jury trial in this cause and to make such other orders as the Court deems appropriate.

Memorandum of Law

The Court has the authority to order the release of a defendant pending judicial proceedings and to set such conditions of release as to assure the appearance of the defendant. 18 U.S.C. §§ 3141(a) and 3142(c). The Court has the authority to change and enforce these conditions. 18 U.S.C. §§ 3142(c)(3) and 3148.

The Transportation Security Administration has the authority, in consultation with other federal agencies and air carriers, to establish policies and procedures requiring air carriers to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security and, if such an individual is identified, to prevent the individual from boarding an aircraft or to take other appropriate action with respect to that individual. 49 U.S.C.A. § 114(h)(3); see also 49 C.F.R. § 1544.305(b). However, in this particular case, the Transportation Security Administration does not appear to have complied with its own policies and procedures “to use information from government agencies” in order “to identify individuals on passenger lists who may be a threat to civil aviation or national security” in deciding to place the Defendant on the “no-fly” list. Rather, the circumstances allow the conclusion that this decision was based not on government agency information but entirely upon the Defendant’s counsel’s notification of the Defendant’s status as a defendant in this case. The Defendant and his undersigned counsel are mindful that a Circuit Court of Appeal normally has jurisdiction to review such a decision if it constitutes a final order. 49 U.S.C.A. § 46110. In the present case, however, this decision was precipitated solely or primarily on the basis of the Defendant being under the jurisdiction of this Court and had a direct effect upon the release orders of this Court. The Defendant therefore submits that the Court has jurisdiction to enforce its order against the contravention of the Transportation Security Administration without having to review the placement of the Defendant on the “no-fly” list as a final order.

Further, the Defendant raises constitutional challenges to the action of the Transportation Security Administration that go beyond the interests of a traveler wishing to be a commercial airline passenger. Because the Transportation Security Administration was informed of the

Defendant's status as a defendant in this case, the Transportation Security Administration acted in deliberate disregard both of the Defendant's due process rights and right to counsel under the Fifth and Sixth Amendments of the United States Constitution and of this Court's order permitting the Defendant to travel between Chicago and Tampa. The Transportation Security Administration effectively and knowingly impaired the Defendant in the exercise of these rights solely because the Transportation Security Administration was notified that he was vested in these rights as a result of the criminal charges against him. This resulted in a challenge to the jurisdiction of this Court by restricting the Defendant's ability to exercise these rights before the Court. Because this is a broad constitutional challenge and not merely a challenge against an administrative order, the Defendant submits that this Court has jurisdiction to rule on this matter.

The Defendant further submits that the Transportation Security Administration should be made to answer whether the decision to place the Defendant on the "no-fly" list was a direct result of notification that he is a defendant in this case and not for a reason pursuant to 49 U.S.C.A. § 114(h)(3). If so, the Defendant requests the Court to order the removal of the restrictions that impair the Defendant from exercising his rights in this case.

Respectfully submitted,

/S Bruce G. Howie
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Certificate of Service

I HEREBY CERTIFY that on February 24, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that on February 24, 2005, I mailed the foregoing document and the notice of electronic filing by U.S. Mail to the Transportation Security Administration, West Tower TSA-20, 10th Floor, 400 Seventh Street, S.W., Washington, DC 20590-0001.

S/ Bruce G. Howie
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